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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DANA C. PERRY, Defendant and Appellant.	B148349 (Los Angeles County Super. Ct. No. MA017832)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Duffey, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Jason Tran, Deputy Attorneys General, for Plaintiff and Respondent.

Dana Perry was convicted of numerous sexual offenses against a child. On appeal, he contends that the admission of evidence under Evidence Code section 1108 deprived him of a fair trial, due process, and equal protection. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As the sole issue on appeal relates to the introduction of evidence of other sexual offenses under Evidence Code section 1108, a full recitation of the facts of this case is unnecessary. Perry was charged with three counts of committing lewd or lascivious acts on a minor under the age of 14 years (Pen. Code, § 288, subd. (a)); aggravated sexual assault of a child involving oral copulation (Pen. Code, § 269, subd. (a)(4)); aggravated sexual assault of a child involving sexual penetration (Pen. Code, § 269, subd. (a)(5)); aggravated sexual assault of a child involving rape (Pen. Code, § 269, subd. (a)(1)); and a forcible lewd act on a child (Pen. Code, § 288, subd. (b)(1)). A special allegation of great bodily injury was made with respect to the forcible lewd act count, under Penal Code sections 667.61, subdivision (b), 12022.7, and 12022.8. The victim in all counts was an eight-year-old female relative of Perry's.

Perry was convicted as charged and sentenced to prison for a term of 27 years to life. He appealed. His initial appeal was dismissed due to his first appellate counsel's repeated failure to file an opening brief in conformity with the California Rules of Court. This court granted Perry's motion to recall the remittitur on January 29, 2007, and ordered that counsel be appointed to represent him on appeal. New appellate counsel was appointed March 29, 2007, and filed her opening brief on September 13, 2007.

DISCUSSION

Before considering the sole issue raised on appeal by Perry's counsel, we must address the deficient briefing submitted in this case concerning perceived constitutional defects in Evidence Code section 1108, briefing that fails to meet the standards for appellate briefs. The argument submitted by counsel against permitting the use of

evidence of other sexual offenses in a sexual abuse case did not identify what evidence counsel claims should not have been introduced against Perry.[1] Counsel made no argument as to why the admission of the unidentified but challenged evidence was prejudicial to her client. "Even if the claim of error has been preserved by an objection in the trial court, appellant cannot prevail without establishing that she was prejudiced by the alleged error." (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 407.) Counsel made no effort to apply the law to the facts and evidence of this case. The absence of particularized, complete argument alone would permit us to reject Perry's contentions. (See, e.g., *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1985) 165 Cal.App.3d 429, 441 [matter waived on appeal where there is no "particularized argument regarding the admissibility of the evidence in question"]; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 [appellants are obligated to refer the court to the specific places in the record where error occurred and to point out how they were prejudiced by the error asserted].)

More troubling, however, than these myriad briefing deficiencies is counsel's lack of candor in addressing the fact that the sole issue she raises on appeal was explicitly

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[1] Counsel provided a 26-page statement of facts, from which this court is apparently supposed to identify the evidence counsel claims was improperly admitted. "It is not the duty of a reviewing court to search the record for evidence on a point raised by a party whose brief makes no reference to the specific pages where the evidence can be found." (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.) Counsel also failed to identify where in the proceedings trial counsel objected to the admission of the evidence and what the resultant ruling was, a matter of significance that will be further discussed below. "The party also must cite to the record showing exactly where the objection was made. ([Cal. Rules of Court, former] Rules 14(a)(1)(C), 33(a) [now Rules 8.204(a)(1)(C) & 8.360(a)]; *Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199, 214 P.2d 603.) When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made. [Citations.] We can simply deem the contention to lack foundation and, thus, to be forfeited. [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.)

waived in the trial court. Perry initially successfully objected to the admission of evidence under Evidence Code section 1108, but later retracted his objection, advising the trial court that this was a strategic decision. Perry's trial counsel had objected to the testimony of the victim's six- or seven-year-old cousin as to other sexual abuse committed by Perry. The trial court concluded that evidence of uncharged sexual acts performed by Perry on that witness was more prejudicial than probative and refused to permit the testimony. During trial, however, Perry's trial counsel changed his mind about that evidence. It is clear from the transcript that this strategic decision was first disclosed in an in-chambers conference, and that defense counsel then explained the decision on the record. The court began the discussion as follows: "We have discussed several times your strategy and what the issues were going to be with regard to [Evidence Code section] 1108 evidence in regard to the young man nicknamed M[.], true name K[.] P[.], and the court had originally in response to a motion—I assume it was a defense motion at that time—yes, the [Evidence Code section] 1108 [motion]—actually, it was a People's motion to introduce the evidence of sexual contact alleged between the defendant and the young six-year-old [K.P.], and under [Evidence Code section] 1108 I declined to let the prosecution introduce that evidence for the reasons stated at the time. [¶] However, Mr. Rub [defense counsel] decided strategically, for whatever reasons that he's going to state in a minute, that he wanted that evidence on the record . . . ." The court asked counsel to explain his reasoning: "So, Mr. Rub, for the record, if for any appellate purposes, why don't you tell us what your thoughts are in that regard."

Defense counsel explained, "Well, I don't want to go into what my thoughts are, Your Honor, but I discussed it with my client, and strategically we decided to waive any objection and in fact go into whatever allegedly happened with [K.P.] . . . ." The court clarified, "So strategically and tactically you made those decisions because you think it's in your best interest to put all of that evidence forward and argue it in whatever way you wish to?" Counsel answered, "That's correct."

The court continued, "So your strategy, just in a general sense, is really just to call it, let it all hang out, rather than try to suppress that or object to that and keep those things

away from the jury, your thought is to let all of this come in and deal with it in the way you think most favorable to Mr. Perry." Counsel again agreed: "That's correct." The court then said, "We don't have to get into it any more than that. We just put it on the record that it's a matter of your own tactics and strategy, and, of course, you're entitled to exercise that. And if anybody at a later time has any question about it, they'll know that it was a conscious thought-out decision that you made in consultation with Mr. Perry." Defense counsel reiterated, "And with Mr. Perry. Let's say it's conscious."

In an abundance of caution, the trial court then solicited Perry's personal approval for this strategic decision. The court asked, "Mr. Perry, you know what he's talking about and you two have discussed this and made decisions together in this regard; is that correct?" Perry answered, "Yes, Sir."

We are dismayed that appellate counsel failed to disclose that the objection to the evidence of other sexual offenses was expressly withdrawn in the trial court. Business and Professions Code section 6068, subdivision (d) establishes that it is an attorney's duty "To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (See also Rules Prof. Conduct, rule 5-200.)

The non-disclosure was not remedied in the reply brief, in which counsel addressed the express waiver only with an inapposite argument: "A defendant is not under an obligation to make a futile objection [citation]; given the role of *stare decisis*, any constitutional objection at the trial level would have been futile. [Citations.] There was thus no waiver in appellant's failure to object on constitutional grounds. [Citation.] Moreover, if objection was required, it was ineffective assistance of trial counsel to fail to pursue an objection, as there could be no reasonable tactical justification for allowing inherently prejudicial other crimes evidence in this case. [Citations.]" Here, even after the facts were brought forth by the Attorney General, appellate counsel again failed to acknowledge, let alone address through argument, what actually occurred in the trial court. Instead, counsel relied on conclusory assertions about futility, a failure to object,

and an absence of tactical justification, all of which fly in the face of trial counsel's successful objection to this evidence and his later tactical decision to withdraw the objection in the trial court.[2]

Based on his express waiver of his successful objection to the challenged evidence and the tactical decision to present this evidence, Perry is foreclosed from alleging error in admitting the evidence on appeal. (*People v. Lang* (1989) 49 Cal.3d 991, 1031-1032 ["the doctrine of invited error operates to estop a party from asserting an error when the party's own conduct has induced its commission [citation], and from claiming to have been denied a fair trial by circumstances of the party's own making [citation]. Thus a defendant who without justification has caused a courtroom disturbance cannot urge the resulting prejudice as grounds for mistrial [citations], nor can a defendant who has volunteered information during testimony successfully urge error in the admission of the volunteered statements [citation]"].)

Even were the issue not forfeited, Perry's constitutional argument would not prevail. In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court rejected a due process challenge to Evidence Code section 1108. Although he contends that the holding in *Falsetta* must be reevaluated in light of the Ninth Circuit Court of Appeals' decision in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, reversed on another ground in *Woodford v. Garceau* (2003) 538 U.S. 202, *Garceau v. Woodford* is neither binding on this court (*People v. Avena* (1996) 13 Cal.4th 394, 431) nor is it applicable here. *Garceau* concerned the introduction of evidence pursuant to Evidence Code section 1101 that the defendant had previously been convicted of murder and that he manufactured illegal drugs, not the admissibility of prior sex offenses in a sex offense case. (*Garceau v. Woodford*, *supra*, 275 F.3d at p. 773.) The California Supreme

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[2] This court would have been aided by opening and reply briefs that candidly acknowledged of the state of the case, and then, if possible, provided a reasoned argument supported by references to the record and citations to authority as to why trial counsel's withdrawal of the objection and decision to delve into other crimes evidence himself was not fatal to the constitutional argument appellate counsel presented.

Court had held that the admission of prior crimes evidence to show propensity to commit murder violated state law but that the error was harmless. The Ninth Circuit disagreed with the finding that the error was harmless, not on the underlying inadmissibility of the other crimes evidence. Therefore, *Garceau v. Woodford* does not demonstrate that the ruling in *Falsetta* that Evidence Code section 1108 is constitutional should be revisited.

Perry nonetheless contends that *Falsetta* should be reconsidered because the two safeguards discussed by the court in *Falsetta*, *supra*, 21 Cal.4th at pages 914 through 920—the weighing process of Evidence Code section 352 and the availability of limiting instructions for the jury—are not adequate to protect criminal defendants. The California Supreme Court is the proper tribunal to reconsider *Falsetta* if it is appropriate to do so. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, Perry's argument that because propensity evidence is admitted only in sex offense cases, Evidence Code section 1108 violates the equal protection clause in that it discriminates on an irrational basis, was rejected in *People v. Fitch* (1997) 55 Cal.App.4th 172, at pages 184 through 185. In *Fitch*, the court held, "The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law. Defendant's arguments as to the recidivism rate of sex offenders are unavailing. In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others." The Supreme Court cited this discussion approvingly in *Falsetta*, *supra*, 21 Cal.4th at pages 917 through 918. We agree with the rationale of *Fitch* and would reject Perry's equal protection argument if it were properly before this court.

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.